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Nos. ~~5850~~ and ~~6000~~

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

LOVERTA ALEXANDER, ET AL., APPELLANTS

v.

HAROLD O. SWANK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted pursuant to the Court's invitation of December 14, 1970.

OPINIONS BELOW

The opinion of the single judge district court (Alexander, App. A; Townsend, App. 1-3) is unreported. The opinion of the three-judge district court (Alexander, App. B; Townsend, App. 4-21) is not yet officially reported.

JURISDICTION

The judgment of the three-judge district court was entered on April 30, 1970, and timely motions to vacate and reconsider were denied on June 12, 1970. The notices of appeal were filed on July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether state welfare programs, in order to be eligible for federal matching grants under the Aid to Families with Dependent Children (AFDC) program, must extend aid to all categories of children included within the definition of "dependent child" under Section 406(a) of the Social Security Act, 42 U.S.C. 606(a).

2. Whether the Illinois AFDC program, which provides for aid to children between the ages of 18 and 21 who attend high school or vocational school, but not those who attend a college or university, violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT

The Federal Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. 601 et seq., which is jointly financed by the states and the federal government and operated in each state under a federally-approved plan, provides welfare assistance to needy families with dependent children. This is a class action by two college students and their mothers, seeking to compel Illinois and Cook County welfare officials to resume payment of AFDC benefits which were terminated when the students reached age 18. The benefits were denied under an Illinois statute (Ill. Rev. Stat., 1967, ch. 23, par. 4-1.1) and regulation

(Illinois Public Aid Regulation 150) which permit AFDC payments for only those children, aged 18-21, who are full-time students at a high school or vocational school. Appellants contend that Illinois is required by the Social Security Act to provide assistance to all persons who meet the definition of "dependent child" set forth by Section 406(a)(2) of the Act, 42 U.S.C. 606(a)(2). This definition includes needy persons, 18-21, who are full-time students at a college or university.[1/] Alternatively, appellants argue that, if refusal to provide benefits to college students does not violate the Act, it violates the Equal Protection Clause.

A three-judge district court, convened pursuant to 28 U.S.C. 2281, 2284, granted summary judgment for defendants. Upon examination of the Social Security Act, as well as the legislative history of Section 406

1/ Section 406(a) provides:

> The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first counsin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designated to fit him for gainful employment.

(a)(2) and the several amendments of that section with respect to the age qualification, the court concluded that the states were not required to employ the federal definition of dependent children in their programs. The court, relying upon Dandridge v. Williams, 397 U.S. 471, also held that there was a rational basis for distinguishing between students aged 18-21 who were in high school or vocational school and those who were in college for purposes of providing AFDC benefits. Consequently, it ruled that the Illinois program did not violate the Equal Protection Clause.

ARGUMENT

I

STATES ARE NOT REQUIRED BY THE SOCIAL SECURITY ACT TO PROVIDE AFDC BENEFITS FOR ALL PERSONS WHO MEET FEDERAL ELIGIBILITY REQUIREMENTS

Petitioners contend that Illinois is required to provide AFDC payments to all persons who fit the definition of dependent child set forth in Section 406(a) of the Social Security Act, 42 U.S.C. 606(a), among them needy children between 18 and 21 who attend a college or university. The Act does not, however, impose such a requirement. Section 406 merely indicates the maximum scope of federal financial participation available to state AFDC programs.[2/] The

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2/ The proposed Family Assistant Act of 1970 (HR 16311) would make assistance to individuals under 22 who are in school or college mandatory, both under Part D (Sections 441-449) of the Social Security Act, funds for which would be all federal, and Part E (Sections 451-455), for which the federal government would provide matching funds.

states may make reasonable classifications limiting the persons, within the definition, to whom they will provide AFDC. This interpretation is fully supported by the legislative history of Section 406, which is particularly explicit with respect to the age requirement. And it is reflected by the consistent administration of the AFDC program by the Department of Health, Education and Welfare. See McClelland v. Shapiro, No. 13,627, decided April 20, 1970 (D. Conn.).[3/]

1. The original Social Security Act set sixteen as the maximum age for a dependent child. 49 Stat. 629. The age provision has since several times been liberalized, and each time it was made quite clear in Congress that extension of benefits to the new group of eligibles was optional with the states. In 1939, Section 406(a) was broadened to include needy children "under the age of eighteen, if found by the State agency to be regularly attending school." 53 Stat. 1380. Committee Reports on the measure indicate that it was universally supposed that the amendment imposed no new requirement on the states. The House Report, for example, stated that "[t]he age limit for Federal grants is raised from 16 to 18 * * *. It is

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3/ In McClelland, a three-judge district court upheld Connecticut's limitation of AFDC benefits to 19-year olds who were in secondary schools against basically the same statutory and constitutional claims made by appellants in this case.

estimated that about 100,000 additional children may obtain aid by virtue of this change, provided all States amend their laws accordingly. * * * [T]he amendments are effective only at such time and to the extent that the States match the Federal funds." H.R. Rep. No. 728, 76th Cong., 1st Sess. 28-29 (1939). See also S.Rep. No. 734, 76th Cong., 1st Sess. 29 (1939).

In 1957, federal matching became available for state assistance to all needy children under 18. 70 Stat. 850. But the removal of the school attendance requirement did not signal mandatory inclusion of all needy children 16-18 under AFDC. The change only "would permit Federal sharing," if the state chose to extend the program. S.Rep. No. 2133, 84th Cong., 2d Sess. 30 (1956). Needy children between 18 and 21 who were regularly attending high school or a vocational or technical school were made eligible in 1964. 78 Stat. 1042. It was noted that "[t]he extension of the [Federal matching] program in this manner would be optional with the States." S.Rep. No. 1517, 88th Cong., 2d Sess. 2 (1964); see also, 110 Cong. Rec. 23701 (1964) (statement of Congressman Mills).

Section 406(a) was amended to read as it presently does in 1965. 79 Stat. 422. Once more, the Congress made it plain that it did not intend, by

its change, to alter the established principle that full coverage of all persons for whom matching funds could be obtained was optional with the States. The Senate Report stated:

> Under existing law States, at their option may continue payments to needy children up to the age of 21 in the aid to families with dependent children program, providing they are 'regularly attending a high school * * * or regularly attending a course of vocational or technical training designed to fit him for gainful employment.' The committee added an amendment extending this provision so as to include needy children under 21 who are regularly 'attending a school, college or university.' Federal sharing for this purpose would thus be available to States who implement such a program. [S. Rep. No. 404, Part I, 89th Cong., 1st Sess. 147 (1965)]. 4/

2. HEW's Handbook of Public Assistance Administration, Section IV-3200, states the Department's position on whether the federal eligibility definition is mandatory: "[t]here is no prohibition or requirement with respect to age; however, the cited provisions * * * do define the limits of Federal financial participation with respect to age." Since the onset of the AFDC program, the Department has consistently approved

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4/ The Report did state, as appellants point out (Alexander Br. 8), that this change would bring AFDC provisions "more nearly in line" with those governing the Old Age Survivor and Disability Insurance Program of the Social Security Act, 42 U.S.C. 401, et seq. Under that program, an otherwise eligible child between 18 and 22 who is a full-time student at an educational institution, including a college or university, must receive benefits. But the statement in the Senate Report provides no basis for concluding that the Congress intended to revoke the authority of the states to establish reasonable age limitations on their AFDC programs. Such a radical alteration would unquestionably not have been announced in such an obscure and indirect fashion.

state plans[5] which set a maximum age limit lower than that permitted by Section 406(a). Thus, in 1937, when the maximum was 16, 35 of 39 states with programs set an age requirement below that.

After the 1957 change permitting assistance to all dependents under 18 became effective, only 26 of 53 programs provided aid to all persons who met the federal definition. Another 22 states retained the requirement that dependents age 16 and 17 remain in school. There are presently AFDC programs in 54 jurisdictions. Of these, 46 have extended the maximum permissible age to "under 21." Thirty-eight permit aid to dependents 18-21 who attend a college or university as well as those who attend a high school or vocational or technical school. Eighteen states retain a school attendance requirement for 16 and 17 year olds.[6]

3. States also have discretion with respect to the designation of relatives listed in Section 406(a) with whom a needy child may live and still receive AFDC payments. The original Social Security Act permitted a needy child to receive assistance with Federal

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5/ Section 402, 42 U.S.C. 602, sets certain mandatory conditions which states must meet to the satisfaction of the Department. If the plan is not approved, no matching funds may be provided. In addition to the explicit conditions of Section 404, the Department has traditionally imposed a general requirement of reasonable relationship to the purposes and history of the Act. See Note, "Welfare's Condition X," 76 Yale L.J. 1222 (1967).

6/ Statistics were compiled by the Social and Rehabilitation Service of the Department.

matching under the Title IV program if the child was living with his "father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt." It was pointed out in the Senate that "[a] state will not have to aid every child * * *. It may limit aid to children living with their widowed mother, or it can include children without parents living with near relatives," 79 Cong. Rec. 9269 (1935) (Senator Harrison).

The list of acceptable relatives was expanded in 1956 to include first cousins, nieces, or nephews. Congress reaffirmed the discretion vested in the states to limit the class of relatives with whom a dependent could live and still receive assistance. It explained that the amendment would only "permit Federal participation in assistance to needy children * * * who are living in the homes of first cousins, nieces, or nephews, thereby extending the degree of relationship slightly beyond the present law," S. Rep. No. 2133, 84th Cong., 2d Sess. 30 (1956).

State discretion under Section 406 is, of course, not without limits. In King v. Smith, 392 U.S. 309, this Court held illegal under the Act a state's refusal to provide AFDC payments to children who met all the dependency criteria except that they had a "substitute father." The Court concluded that the state had failed to meet the statutory requirement "that 'aid to families

with dependent children . . . shall be furnished with reasonable prom ess to all eligible individuals.'" 42 U.S.C. 602(a)(10). That Section, in combination with Section 406(a), the Court held, requires, "participating States to furnish aid to families with dependent children who have a parent absent from the home, if such families are in other respects eligible." 392 U.S. at 317.

The language in King v. Smith can be broadly interpreted to support the proposition that States are required to furnish aid to all dependents who fall within the federal definition. No such interpretation, of course, could be squared with the long-standing administrative practice under Section 406(a) or its legislative history. The King decision has a narrower office. The central purpose of the AFDC program is to provide assistance to children deprived of parental support who continue to live with relatives of a certain proximity. While the States have a certain discretion to define the relatives with whom a dependent child may live if he is to receive aid, they may not employ irrational or arbitrary distinctions. Thus a state program which permitted aid to a child living with a first cousin but not with his widowed or abandoned mother, just as a program that aided all persons 12-21 but none under 12, would presumably not be approved by HEW.7/

7/ HEW had not approved the plan in question and was negotiating with the State regarding the "substitute father" regulation when litigation was commenced.

The purposes of the Act similarly were undermined by the "substitute father" regulation which indulged a "transparent fiction," 392 U.S. at 334, that a man who merely "cohabited" with a child's mother but had no legal duty to support him somehow served the same function as the child's natural father. Thus, King v. Smith, is, at bottom, simply an example of the limiting statutory principle which prevents a state from structuring its program in a patently arbitrary manner that is unrelated to, if not in conflict with, the purposes of the Act.

III

THE DISTINCTION FOR PURPOSES OF AFDC ELIGIBILITY BETWEEN COLLEGE STUDENTS AND VOCATIONAL OR HIGH SCHOOL STUDENTS IS A RATIONAL ONE AND THEREFORE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Petitioners additionally contend that, even if the states have discretion to establish age limits for AFDC payments, they are without discretion to provide aid to dependents pursuing one type of education rather than another. Further, they argue that the distinction among students violates the Equal Protection Clause.

There is nothing in the Act or its legislative history, however, which suggests that states may not classify students, aged 18-21, on the basis of the type of education they pursue. The only limitation imposed by the Act is that such classifications be

reasonably related to the purposes of the Act. See supra, note 5. For purposes of this discussion, that requirement can be considered together with the requirement imposed by the Equal Protection Clause.

In Dandridge v. Williams, 397 U.S. 471, this Court articulated the standard for determining whether decisions regarding welfare payments violate the Equal Protection Clause.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78." 397 U.S. at 485. 8/

The classification involved here was reasonable. As the three-judge district court found, a state might rationally conclude that children with the capacity to do college work are more likely to become employable without governmental assistance than children with lesser mental abilities. Cf. McClelland v. Shapiro, supra. Congress apparently made a similar judgment when it extended the scope of the federal AFDC program

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8/ The Court thus rejected the more stringent test, advocated here by petitioners, which requires a compelling state interest to justify discriminatory classifications. See Shapiro v. Thompson, 394 U.S. 618. That case, however, involved the fundamental right to travel. No comparable right is involved here. See McClelland v. Shapiro, supra; Note, Developments in the Law--Equal Protection, 82 Harv. L. Rev. 1065, 1129 (1969).

to include children between the ages of 18 and 21 in high school or vocational school in 1964 without similarly providing matching funds for such children attending a college or university. See S. Rep. No. 1517, 88th Cong., 2d Sess., p. ?. The state also may have been legitimately concerned with the effect on the working poor, whose children are unable to afford college, of providing AFDC to dependent college students. Cf. Dandridge v. Williams, supra, 397 U.S. at 486.

Illinois' program does not conflict with the purposes of the Act. It is true that the Act's goals are not as fully achieved as they might be if money were allocated for college students. But a state, pursuing a reasonable approach, does not run afoul of either the Social Security Act or the Equal Protection Clause by not attempting to solve all its social welfare problems at a single time. See Williamson v. Lee Optical Co., 348 U.S. 483, 488.

CONCLUSION

For the reasons stated, this case presents no issue warranting plenary consideration by this Court. We, therefore, respectfully submit appellee's motion to affirm should be granted.

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